Supreme Court, U.S.
FILED
DEC
AUG 29 1992
OFFICE OF THE CLERK

Nos. 92-593, 92-767

In the
Supreme Court of the United States
October Term, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants

v.

T. K. WETHERELL, *et al.*,
Appellees

UNITED STATES OF AMERICA,
Appellant

v.

STATE OF FLORIDA, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

JOEL I. KLEIN
PAUL M. SMITH
Klein, Farr, Smith & Taranto
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

STEPHEN N. ZACK
(Counsel of Record)
NORMAN C. POWELL
Zack, Hanzman, Ponce & Tucker, P.A.
3300 International Place
100 S.E. Second Street
Miami, Florida 33131
(305) 539-8400

QUESTIONS PRESENTED

1. Whether the express terms of the judgment on appeal, finding no liability on the part of the appellees, bar appellants from presenting issues solely relating to the appropriate remedy for a violation that was announced only in the court's post-judgment opinion.

2. Whether a state-enacted reapportionment plan that provides minority plaintiffs with better than an equal opportunity to elect representatives of their choice can be found to violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

3. Whether a state-enacted reapportionment plan that is found to result in the "fairest balance" of "the competing interests of Hispanics and African-Americans" can simultaneously be held to violate Section 2 of the Voting Rights Act.

TABLE OF CONTENTS

STATEMENT 1

REASONS TO DISMISS OR AFFIRM 10

The appeals should be dismissed because the judgment does not raise the questions presented by Appellants. 12

The undisputed facts demonstrate that Hispanic voters in Dade County have more than an equal opportunity to elect representatives of their choice . 15

The district court's factual finding that the Florida Senate Plan most fairly balances the competing interests of African-American and Hispanic voters also demonstrates that the Plan does not violate the Voting Rights Act. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases:

Aoude v. Mobil Oil Corp., 862 F.2d 890 (1st Cir. 1988) 13

Birdsong v. Wrotenbery, 901 F.2d 1270 (5th Cir. 1990) 13

Bowles v. United States, 319 U.S. 33 (1943) 19

Black v. Cutter Lab., 351 U.S. 292 (1956) 12

California v. Rooney, 483 U.S. 307 (1987) 12

Eakin v. Continental Illinois Nat. Bank & Tr. Co., 875 F.2d 114 (7th Cir. 1989) 14

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 597 So.2d 276 (Fla. 1992) 5-6

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So.2d 543 (Fla. 1992) 5

Krull v. Celotex Corp., 827 F.2d 80 (7th Cir. 1987) . . . 13

McDaniel v. Sanchez, 452 U.S. 130 (1981) 13

Massachusetts v. Wescott, 431 U.S. 323 (1977) 19

Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992) 16, 23

Quilter v. Voinovich, 794 F. Supp. 695, 701 (N. D. Ohio 1992) 28

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 18

Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718, 727 (3rd Cir. 1988) 14

Syntex Pharmaceuticals v. K-Line Pharmaceuticals, 905 F.2d 1525 (Fed. Cir. 1990) 14

Thornburg v. Gingles, 478 U.S. 30 (1986) 7-8, 9, 15-16, 20-21, 24

Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991) *sum. aff'd*, 112 S. Ct. 2296 (1992) . . . 17, 20

Voinovich v. Quilter, No. 91-1618 . . . . . 11, 26, 28-29

Statutes:

28 U.S.C. 2284 6

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:

§ 2, 42 U.S.C. 1973 . 1-2, 9, 11, 15, 17, 21-22, 24, 25-26

§ 5, 42 U.S.C. 1973c 5, 13

Miscellaneous:

6A *Moore's Federal Practice* (2d ed. 1992) 12-13

Fed. R. Civ. P. Rule 52(a) 24

Fed. R. Civ. P. Rule 58 12-13

Fed. R. Civ. P. Rule 59(e) 12-13

Fed. R. Civ. P. Rule 60(a) 12

Fed. R. Evid. Rule 201 19
Florida Constitution, Art. III, § 16(a) 2
Florida Constitution, Art. III, § 16(c) 5
Florida Senate Joint Resolution 2-G 4, 5
Sup. Ct. R. 24.1(a) 14

In the
Supreme Court of the United States
October Term, 1992

No. 92-593

MIGUEL DE GRANDY, *et al.*,
Appellants

v.

T. K. WETHERELL, *et al.*,
Appellees

No. 92-767

UNITED STATES OF AMERICA,
Appellant

v.

STATE OF FLORIDA, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

STATEMENT

The case involves a challenge to the reapportionment plan adopted by the State of Florida after the 1990 federal decennial census. Appellants, a group of Hispanic plaintiffs, referred to as the "De Grandy" appellants, and the United States, which generally supports the De Grandy effort, prevailed in their challenge under Section 2 of the Voting

Rights Act, 42 U.S.C. § 1973, against the Florida Plan for the State House of Representatives, but not against the Plan for the State Senate. The House officials have filed a jurisdictional statement in No. 92-519, *Wetherell v. De Grandy*. The De Grandy appellants and the United States have filed separate jurisdictional statements in No. 92-593, *De Grandy v. Wetherell,* and No. 92-767, *United States v. Florida,* challenging the decision as to the Senate Plan. This response demonstrates that the De Grandy and United States appeals should be dismissed or, in the alternative, that the district court's judgment finding no liability as to the Senate Plan should be summarily affirmed.

1. *The Reapportionment Process.* Pursuant to the Florida Constitution, Art. III, § 16(a), the state legislature is required to develop a reapportionment plan, based on the decennial federal census data, to govern House and Senate elections. In anticipation of the 1990 census, and cognizant of the large population changes in Florida during the 1980's, the legislature began preparing for this assignment in 1987. The House and the Senate hired expert technical staff and provided them with state-of-the-art computer systems. Both chambers appointed Committees on Reapportionment to aid in developing legislative plans, and both committees included African-American and Hispanic members in key decision-making positions. Testimony of Representative Miguel De Grandy, Tr. IV, 42-45; Testimony of Representative Willie Logan, Tr. VII, 73-77; Testimony of Leon Russell, Vice President of the State Conference of the NAACP, Tr. III, 107-108. The House and Senate also co-hosted 32 public hearings throughout the State and two statewide teleconferences. The purpose of the hearings and teleconferences was to ensure increased public awareness on reapportionment and to provide the legislature with public input prior to the adoption of any reapportionment plan.

According to 1990 census data, Florida's total population increased from 9,746,324 in 1980 to 12,937,926 in 1990. Bureau of the Census, Dep't of Commerce, Pub. PC80-1-B11, 1980 Census of Population (Florida) 26 (Aug. 1982); Bureau of the Census, Dep't of Commerce, Pub. CN:11271491053, 1990 Census of Population and Housing (Florida) 1 (Jan. 1991). Florida's population is primarily composed of three major ethnic and racial groups: non-Hispanic whites (or whites), African-Americans (or blacks), and Hispanics. There are 9,475,326 whites, which amounts to 73 percent of the State's total population; 1,701,103 African-Americans (13%); 1,574,143 Hispanics (12%), and 187,354 others (1%). *Id.*

Dade County, which is the part of the reapportionment plan that is challenged by both appellants here, is Florida's most populous county. During the 1980's Dade's total population increased by 19 percent, from 1,625,781 to 1,937,094. 1980 Census at 34; 1990 Census at 59. But the County's growth did not keep pace with the State as a whole. As a result, in the 1992 reapportionment, Dade lost a Senate seat and is, on a pro rata statewide basis, now entitled to only 6 such seats.[1] *See* Testimony of Miguel De Grandy, Tr. II, 155-156.

Hispanics make up 49 percent of Dade County's total population and 50 percent of its voting age population (VAP); whites make up 30 percent of the County's total population and 32 percent of the VAP; and African-Americans make up 19 percent of the total population and 16 percent of the VAP. U.S. Ex. 7, pp. 24-25, 61. The number of Hispanics living in Dade County increased by 372,413 people or 64 percent in the period from 1980 to 1990. *See* 1980 Census at 34; 1990 Census at 59. This substantial gain was primarily the result of

---

[1] Dade County's population is 1,937,094. The ideal Senate District is 323,448, based on a statewide population of 12,937,926 divided into forty equal-sized districts. Dade is thus numerically entitled to 5.99 Senate districts.

immigration from Latin American countries. Testimony of Dr. Dario Moreno, Tr. II, 14, 18-19; *see also* U.S. Ex. 37, pp. 5-6.[2] As a result, approximately one-third of the County's VAP is non-citizen. Testimony of William De Grove, Tr. VII, 17-18.

2. *The Reapportionment Plan.* On April 10, 1992, the Florida Legislature, relying on the information obtained from the 1990 census and from its public hearings, adopted Senate Joint Resolution 2-G ("SJR 2-G" or the "Plan") reapportioning the State's forty Senatorial districts. SJR 2-G created five Senate seats wholly within Dade County (Districts 34, 36, 37, 38 and 39) and two Senate seats (Districts 32 and 40) that are made up of a part of Dade County and a part of an adjoining county — one to the north and one to the south.[3] Hispanics constitute a majority of the VAP in three of the Senate districts wholly within Dade County; African-Americans constitute a majority in one of the two remaining districts wholly contained within the County, as well as a controlling plurality in one of the two districts partly in the County;[4] and whites constitute a majority in the final two districts. U.S. Ex. 7, p. 24-25.

---

[2] The major countries of origin for Dade County's Hispanics are Cuba, Nicaragua, Puerto Rico, Colombia, The Dominican Republic, Mexico, Honduras, Peru, and Guatemala. U.S. Ex. 37, Table 3.

[3] The fact that two of these districts extend from Dade County into a neighboring county is a result of geography and has never been challenged on Section 2 or constitutional grounds. The southernmost county in Florida (directly below Dade) is Monroe County, which has approximately 78,000 people. That county is joined with approximately 246,000 people from south Dade County and downtown Miami to achieve a district that is approximately the same size as the other 39 Senate districts. By the same token, a second district with approximately 76,000 residents in North Dade is filled out with approximately 248,000 persons from adjacent Broward County.

[4] The district court found that in District 40, "African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a.

On April 13, 1992, pursuant to Art. III, § 16(c), of the State Constitution, the Florida Attorney General petitioned the Florida Supreme Court for judicial review of SJR 2-G.[5] On May 13, 1992, the state court held that SJR 2-G was valid and approved it. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So.2d 276 (Fla. 1992). Thereafter, the Florida Attorney General submitted the Plan to the United States Department of Justice for preclearance review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[6] On June 16, 1992, the United States issued its preclearance decision, stating that its sole objection was to the Plan's Senate districts because of a problem it perceived in the Hillsborough County (Tampa) area. U.S. Ex. 16. In response, on June 22, 1992, the Florida Supreme Court amended the Plan to remedy this objection. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 601 So.2d 543 (Fla. 1992).

The De Grandy appellants fully participated in the proceedings before the Florida Supreme Court, arguing that SJR 2-G violated the Voting Rights Act because it failed to create additional majority-minority districts. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So.2d 276, 284 (Fla. 1992). Concentrating on Dade County's Senate districts, the appellants contended that a fourth majority Hispanic Senate

---

[5] Art. III, § 16(c), Fla. Const., provides as follows:

> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

[6] Five of Florida's counties are subject to the preclearance requirements of Section 5. Dade County is not one of them.

district should have been created. *Id.* The Florida Supreme Court rejected this contention, finding that the Plan did not discriminate against minorities. *Id.* at 285. Furthermore, the Court concluded that the Plan is a material improvement over conditions that existed under the 1982 plan because it provides minorities with substantial opportunities to influence elections and to elect representatives of their choice. *Id.* The Court's ruling, made under tight time limitations, was without prejudice to any interested party's right to file a subsequent petition before it, alleging a violation of Section 2 of the Voting Rights Act. *Id.* The De Grandy appellants declined to file such a petition, choosing instead to seek leave to amend the complaint that they had previously filed in federal court.[7]

3. *The Federal Court Proceedings.* In their amended complaint in federal court, the De Grandy appellants raised the same Section 2 claims against the Senate Plan, again seeking a fourth majority Hispanic district in the Dade County area. The district court, which had been designated as a three-judge court pursuant to 28 U.S.C. § 2284, granted appellants' motion to amend on June 22, 1992. On June 23, 1992, the United States filed a complaint in the district court, alleging the same Section 2 violation raised in the De Grandy appellants' amended complaint with regard to Dade County's Senate districts. On June 26, 1992, the district court consolidated for trial the complaints of the De Grandy appellants and the United States, along with another complaint by the NAACP.[8]

The trial began on the same day that the court entered its consolidation order and lasted five days, until July 1, 1992.

---

[7] The De Grandy appellants initially had filed a complaint in the District Court for the Northern District of Florida on January 14, 1992. The complaint alleged, among other things, malapportionment (under the 1982 Plan) and prayed for the district court's intervention to redraw Florida's legislative and congressional districts. The subsequent passage, approval, and modification of SJR 2-G mooted this initial claim.

[8] The NAACP also had filed a complaint in the same district court, on April 10, 1992, alleging malapportionment against African-Americans.

Purporting to rely on the decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs below attempted to prove that the Senate Plan violated Section 2 by demonstrating that it failed to *maximize* Hispanic voting strength in Dade County. Testimony of Daryl Reaves, Tr. II, 179, 184; Testimony of Allan Lichtman, Tr. III, 28-31; Testimony of Miguel De Grandy, Tr. II, 153-154. The De Grandy appellants and two intervening parties introduced alternative plans containing an additional majority VAP Hispanic district.[9]

In response, the Senate defendants presented four arguments and supporting evidence. First, they claimed that the Voting Rights Act does not require maximization of minority voting strength. Tr. VIII, 45-46, *see also* argument of Executive Defendants, Tr. VIII, p.51. Second, they argued that the Plan provided Hispanics with a meaningful opportunity to elect candidates of their choice at a level equal to their proportion of the Dade County population, even though the Voting Rights Act does not require such proportional representation. *Id. See also* Testimony of Ron Weber, Tr. VI, 48. Third, they contended that Hispanics were afforded more than a proportional share of Dade County's senatorial districts in view of the facts that 55 percent of voting age Hispanics in Dade County are not citizens and that only 31 percent of the total citizen voting age population in Dade County is Hispanic. Testimony of William De Grove, Tr. VII, p. 20; Testimony of Ron Weber, Tr. VI, 53. Finally, the Senate defendants and the NAACP presented evidence to show that the creation of an additional Hispanic district in Dade County would dilute African-American voting strength in that area. Testimony of John Gutherie, Tr. IV, 153-158, 178-186; Testimony of Ron Weber, Tr. VI, 47, 68, 135-136; Testimony of Leon Russell, Tr. III, 110, 127.[10]

---

[9] Humphrey, *et. al.*, and Hargrett, Brown and Reaves submitted virtually identical alternative plans.

[10] The Senate defendants also argued that appellants had failed to satisfy the third so-called "*Gingles* precondition" (*see Thornburg v. Gingles*,

4. *The District Court Decision.* On July 2, 1992, the day after trial, the district court entered its final judgment, upholding the Senate Plan. U.S. App. 5a.[11] With respect to appellants' Section 2 claim, the judgment provides that "[t]he state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 *et seq.*)." U.S. App. 5a.[12]

---

478 U.S. 30 (1986)), which requires that Section 2 plaintiffs demonstrate their failure to elect their candidates of choice because of polarized voting. Tr. VIII, 41-42. Tr. V, 36-38. The SenateDefendants presented evidence demonstrating that Hispanics in Dade County have enjoyed sustained success in electing their candidates of choice at a percentage that exceeds their voting strength. Testimony of Ron Weber, Tr. VI, 60-61, 67-68.

[11] The United States and the De Grandy appellants have both reprinted the judgment and opinion below in Appendices to their respective jurisdictional statements. We will cite the Appendix filed by the United States as "U.S. App."

[12] The remainder of the judgment, paragraphs 1, 2 and 4, provides:

> 1. The State of Florida's state senatorial districts embodied in Senate Joint Resolution 2-G, as modified by the Florida Supreme Court on June 25, 1992 ["1992 Florida Senate Plan"] do not violate Section 5 of the Voting Rights Act of 1965, as amended, (42 U.S.C. § 1973 *et seq.*).
>
> 2. The Court adopts the 1992 Florida Senate Plan as the plan to be utilized in the 1992 Florida Senate elections and in Florida State Senate Elections thereafter.
>
> * * * *
>
> 4. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:
>
> (a) conduct state senatorial elections in 1992 in accordance with the 1992 Florida Senate Plan, a map and written description of which is attached to this Judgment;
>
> (b) conduct state senatorial elections in years after 1992 in accordance with the 1992 Florida Senate Plan.

U.S. App. 5a.

Although no written post-judgment motions for amendment or reconsideration were filed by any appellant,[13] the district court issued an opinion fifteen days later (on July 17, 1992), concluding that the Senate Plan violated Section 2 as to both Hispanic and African-American voters, but that neither violation could be remedied without impairing the interests of the other minority group. The court stated:

> We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended. (Doc. 553.) This language should be read as holding that the Florida Senate Plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate Plan violates Section 2 of the Voting Rights Act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area.

U.S. App. at 72a.

In support of its new conclusion, the court found that the three *Gingles* preconditions — set forth by this Court in a *multimember district* Section 2 case — had been satisfied by both minorities in this *single-member district* case. *Gingles*, 478 U.S. 30. Specifically, the court found that (1) each minority group, viewed independently, is "sufficiently large and geographically compact" to support an additional district in Dade County (U.S. App. 30a-42a);[14] (2) each minority is "politically cohesive" within its own group (*id.* at 44a); and

---

[13] After the court's ruling from the bench on July 1, the De Grandy plaintiffs made an oral motion for reconsideration, which was denied. Tr. VIII, 61. No written motions for reconsideration were filed after the court issued its judgment on July 2.

[14] In its evaluation of numerosity and compactness, the court eschewed consideration of minority coalitions and white cross-over voting. In its subsequent evaluation of remedies, however, the court did consider these factors. *See* pp. 24-25, *infra*.

(3) each minority has had its candidates defeated by "white bloc voting" (*id.* at 48a-53a). The court also found that both groups had suffered discrimination in areas other thn voting. *Id.* at 54a. The court concluded that Hispanic and African-American vote dilution exists in Dade County in violation of Section 2 of the Voting Rights Act. *Id.* at 54a-55a.

The district court then held that the best remedy for these violations was the Florida Senate Plan itself. Based on the record — including the alternative plans submitted by the other parties — the court found "that the creation of a fourth Hispanic VAP supermajority district would adversely affect African-Americans in South Florida and that the creation of a third [African-American] VAP majority district would adversely affect Hispanics in Dade County." *Id.* 64a.[15] The court thus concluded that "the Florida Senate Reapportionment plan is the fairest to all ethnic communities in Dade County and the surrounding areas." *Id.* at 66a.[16]

REASONS TO DISMISS OR AFFIRM

The district court's judgment, by its terms, provides that "[t]he state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan *do not violate* Section 2 of the Voting Rights Act." U.S. App. 5a (emphasis added). Under this Court's settled precedent, that judgment — and not the contrary holding in the district court's subsequent opinion — frames the appropriate scope of the issues presented for review. Consequently, the jurisdictional statements of the De Grandy and United States appellants — which solely raise issues about remedies — must both be

[15] The court had previously ruled that Hispanics need a supermajority (more than 60 percent) of the VAP to elect representatives of their choice, while African-Americans require only a simple majority of the VAP. *Id.* at 57a, 59a.

[16] Judge Vinson joined the court's opinion, but wrote separately to emphasize the points that he considered dispositive. *Id.* at 73a-76a.

dismissed because they are premised on a finding of violation that not only is not presented by the judgment, but squarely contradicts it.

Alternatively, the district court's judgment holding that there was no violation in this case should be summarily affirmed on the merits for two reasons. First, the undisputed facts show that the Florida Senate Plan guarantees both Hispanic and African-American voters in Dade County control over a *greater* proportion of Senate seats than their proportion in the overall voter population. That fact, standing alone, demonstrates that these voters do *not* have "less opportunity than other members of the electorate...to elect representatives of their choice." Section 2, codified at 42 U.S.C. § 1973. Second, as the three-judge court found in its July 17, 1992, opinion, "the Florida Senate Reapportionment plan is the *fairest to all ethnic communities* in Dade County and the surrounding areas." U.S. App. 66a (emphasis added). That factual finding is amply supported by the evidence and also conclusively demonstrates that no violation occurred here.

In disregard of the plain language of the judgment and the compelling evidence to support the district court's conclusion that the Florida Senate Plan does not violate Section 2, the United States argues that "[t]he 'Court should hold this appeal pending its decision in *Voinovich v. Quilter*, No. 91-1618, and should subsequently summarily reverse the district court's remedial order with directions to conduct remedial proceedings to determine the appropriate remedy.' " U.S.J.S. at 19. Both halves of the suggestion are misguided. The issues in *Voinovich* are entirely distinct from those presented here, and in no event would summary reversal be indicated, given the compelling grounds for affirming the district court's judgment of *no* liability. Notably, the De Grandy appellants — who are aligned with the United States in claiming that an additional Hispanic Senate district must be created — argue only that "probable jurisdiction should be noted." De Grandy J.S. at 29.

I. THE APPEALS SHOULD BE DISMISSED BECAUSE THE JUDGMENT DOES NOT RAISE THE QUESTIONS PRESENTED BY APPELLANTS.

These appeals should be dismissed because all of the questions presented are premised on a false assumption — that the court below found a violation of Section 2 but refused to order relief. In fact, the judgment of the court expressly found no such violation. It was only in the court's opinion, entered 15 days later, that the court changed course, now stating that there was a violation but that the existing plan was the best available remedy. In deciding what issues are properly before this Court, that opinion has no legal effect. It follows that the questions offered by appellants are not even "presented" in this case.

It is axiomatic that this Court "reviews judgments, not statements in opinions." *California v. Rooney,* 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Lab.,* 351 U.S. 292, 297 (1956)). Here, the district court on July 2 set forth its "judgment" in a separate, formal document, as required by Fed. R. Civ. P. 58. That judgment remains legally in effect, and is the sole *ruling* that appellants are able to challenge here. After judgment was entered, no party made a motion to amend the judgment. *See* Fed. R. Civ. P. 59(e) (permitting such a motion within ten days). The court itself had the power to amend the judgment substantively within ten days, but did not exercise that power. *See* 6A *Moore's Federal Practice* ¶ 59.12[4], at 59-274 to 59-275 (2d ed. 1992) (court has power to amend judgment *sua sponte,* but if the change is substantive, rather than based on a clerical error of the sort contemplated in Fed. R. Civ. P. 60(a), it must be effected within ten days). Instead, the court issued an opinion 15 days after the judgment, purporting to "clarify" its judgment.

As a matter of law, that opinion could not transform the court's judgment from one finding no liability under Section 2,

as the judgment states, to one finding liability with no available remedy. While an opinion may sometimes help in the interpretation of an *ambiguous* judgment, it cannot make a substantive *change* under the guise of "clarification." *See* 6A *Moore's Federal Practice* ¶ 58.02, at 58-10. *Cf. Birdsong v. Wrotenbery,* 901 F.2d 1270, 1271-72 (5th Cir. 1990) (motion for clarification seeking substantive change in judgment must be treated as a motion to *amend* judgment under Rule 59(e)). *See also Aoude v. Mobil Oil Corp.,* 862 F.2d 890, 895 (1st Cir. 1988) (where court filed findings two months after injunction order, no prejudice to appellant because there was no inconsistency between earlier order and later findings); *Krull v. Celotex Corp.,* 827 F.2d 80, 81 (7th Cir. 1987) (where court merely memorializes previously rendered order within a reasonable time *without significantly altering the substance* of order, subsequent opinion is *nunc pro tunc* and is within court's power). In short, when as here a judgment is clear and not amended, its plain terms remain controlling. Indeed, the contrary view flatly contravenes the requirement in Rule 58 that a court's judgment be set forth in a separate document.

The United States attempts to suggest that the judgment was ambiguous because, while it found no liability under Section 2, it ordered the State to adopt its own Senate Plan. U.S.J.S. at 9 n.7. But there was nothing inconsistent about these two features of the judgment. The court's order requiring the State to comply with the Senate Plan was merely a formalization of an earlier oral ruling, which was made in order to eliminate the need for further *Section 5 preclearance* by the Justice Department. U.S. App. 20a; Tr. I, 37. *See McDaniel v. Sanchez,* 452 U.S. 130 (1981) (court-imposed plans do not require preclearance but plans reflecting the policy choices of elected representatives, even if enacted in response to court orders, do require preclearance).

The judgment below was thus clear and logical. The court's later opinion, far from "clarifying" it, simply contradicted it. In such circumstances, it is uniformly recognized that the judgment is what constitutes the ruling of the court. *See Eakin v. Continental Illinois Nat. Bank & Tr. Co.*, 875 F.2d 114, 118 (7th Cir. 1989) ("[j]udicial opinions do not create obligations; judgments do.... In the event of a conflict between the opinion and the judgment, the judgment controls"); *Syntex Pharmaceuticals v. K-Line Pharmaceuticals*, 905 F.2d 1525, 1526 (Fed. Cir. 1990) (statement in court's opinion was not a judgment within Rules 54 and 58); *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 727 (3rd Cir. 1988) (operative act is the order).

Despite these settled principles, however, the "questions presented" by both appellants are all premised on the assumption that the district court found a violation of Section 2. Those questions, of course, determine the issues that will be considered by the Court. *See* Sup. Ct. R. 24.1(a) (merits brief "may not raise additional questions or change the substance of the questions already presented" in the jurisdictional statement). In light of the fact that appellants have misconstrued the judgment in this case, it cannot be concluded that the questions they present raise substantial issues justifying an appeal. The appeals accordingly must be dismissed.[17]

---

[17] The United States notes this problem in a footnote, arguing that if the "no-violation" holding of the judgment were to be read literally, "the issues before this Court would remain substantially the same." U.S.J.S. at 9 n.7. This is incorrect. A conclusion that the judgment is controlling would leave appellants only the option of arguing that they presented sufficient evidence to require a finding of *liability* under Section 2. They have not presented that issue in their questions presented, focusing instead on the question whether a court may find liability but deny relief.

II. THE UNDISPUTED FACTS DEMONSTRATE THAT HISPANIC VOTERS IN DADE COUNTY HAVE MORE THAN AN EQUAL OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE.

Unlike many voting rights cases, this one is easy. While the De Grandy and United States appellants contend that Hispanic voters are entitled to an additional majority district in Dade County, the fact is that, under the Senate Plan which appellants challenge, Hispanics already have a better chance to elect representatives of their choice than do white voters. Given that fact, it is simply not possible to find a Section 2 violation here. The judgment below can and should be affirmed solely on this ground. No party has challenged the three-judge court's ruling with respect to the Section 2 rights of African-Americans. The following discussion, therefore, will focus largely on the claims of Hispanic voters, which are represented by the De Grandy appellants and the United States.

1. Section 2 of the Voting Rights Act assures that members of a protected minority group are not given "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice." Thus, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black [or other minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). In that regard, "[i]t is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Id.* at 48 n.15 (quoting Section 2).

This essential showing of unequal opportunity cannot be made in this case. On the contrary, under the Senate Plan

that both appellants challenge, Hispanic voters in Dade County are assured the ability to elect more than a fair share of representatives of their own choice. Hispanic voters thus do not face any obstacle to, much less a substantial difficulty in, electing their preferred representatives.

The principle that we rely on to support this conclusion is illustrated by a simple hypothetical. Suppose, for example, that (1) Hispanics comprised 50 percent of the potential voters in Dade County, (2) the Florida legislature divided Dade County into six equal-size Senate districts, and (3) Hispanics were distributed among the six Dade districts such that they had clear numerical voting control in three of them. Unless words have no meaning, this arrangement cannot be said to afford Hispanics "less opportunity...to elect representatives of their choice" than that available to "the other members of the electorate" in Dade County. Indeed, this Court already has held that "persistent proportional representation is inconsistent with [the] allegation that the ability of black voters...to elect representatives of their choice is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77.[18]

The force of this argument is further bolstered by the fact that Section 2 disavows "establish[ing] a right to have members of a protected class elected in numbers equal to their proportion in the population." Given that provision, it would take an entirely perverse reading of the statute to hold that, despite proportional representation (or, as here, extra-proportional representation), there could still be a violation. *See, e.g., Nash v. Blunt*, 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (three-judge court) (a requirement to go beyond proportional

---

[18] Because *Gingles* involved "at large" elections in multimember districts, the Court found that one or even two elections resulting in proportional representation were insufficient to disprove a violation. *Compare* 478 U.S. at 74-76, *with id.* at 77. In this case, by contrast, single-member election district lines are redrawn based on federal census data every ten years, so proportional representation, once established, is sure to endure absent unforeseen demographic changes.

representation imposes "a continuing duty to minimize representation by majority groups — a concept probably more controversial than proportional representation, which, as noted above, was specifically rejected by Congress"); *see also Turner v. Arkansas*, 784 F. Supp. 553, 577 (E.D. Ark. 1991) (three-judge court), *sum. aff'd*, 112 S. Ct. 2296 (1992).

2. The facts of this case are substantially identical to those presented in the dispositive hypothetical just discussed. In fact, when the distinction between all Hispanics and potential Hispanic voters (*i.e.*, U.S. citizens) is taken into account, Hispanics achieve considerably *more* than proportional representation in Dade County. For simplicity's sake, we will look first at the numbers based on total voting age population (regardless of citizenship), and then make an appropriate adjustment to take into account the fact that Section 2, by its terms, applies only to a "denial or abridgement of the [voting] right of any *citizen* of the United States." 42 U.S.C. § 1973(a) (emphasis added).

There are two possible ways to view the numbers here — both of which demonstrate that Dade County Hispanics have a better than equal opportunity to elect state Senators of their choice. First, the analysis can be done only within Dade County; and second, the analysis can be done across the seven Senate districts actually established by the Florida legislature, five of which are wholly within Dade County and two of which are made up of portions of Dade and adjacent counties.

As for the first situation, Dade County, on a *pro rata* population basis, is entitled to almost exactly six Senate seats (out of a total of forty statewide). *See* p. 3, note 1, *supra*. Hispanics comprise 50 percent of the total voting age population in Dade County and thus, on a straight proportionality basis, would have been entitled to three seats. That is, of course, the number that they received — three of the districts in Dade are *more than 64 percent* Hispanic in population (76.1%; 66.3%; 64.3%). *See* U.S. App. 55a.

The fact of proportional representation is also confirmed by looking at the seven districts that are wholly or partially in Dade County. Among those, Hispanics make up approximately 45 percent of the total voting age population (not limited to citizens), and they continue to have the same 64 percent-plus majority in three out of the seven seats, which amounts to 43 percent of the seats. *See* U.S. Ex. 20, 16-17. In other words, the Hispanic percentage of the population is almost identical with the Hispanic percentage of electoral dominance in the seven Senate districts.

On the other hand, if Hispanics were given control over a fourth seat — as both the De Grandy and United States appellants claim Section 2 requires — they would be substantially overrepresented, because they would then have a 57 percent share of the seats, while other groups (either whites or African-Americans) would necessarily be correspondingly underrepresented.[19]

These numbers become even more dramatic when they are adjusted to reflect citizenship. *See, e.g., Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989). As the court below properly found, "[Dade County] Hispanic communities are characterized by a large number of non citizens." U.S. App. 39a; *see id.* 40a n.28. Even using the most conservative estimates, the expert testimony in this case indicated that Hispanics make up less than 40 percent of the voting age citizens in Dade County and less than 35 percent of such citizens in the seven districts. *See* Testimony of William De Grove, Tr. VII, pp. 17-20; Testimony of Ron Weber, Tr. VI,

[19] Within these 7 Senate districts, the African-American VAP is 15 percent of the total VAP, U.S. Ex. 20, pp.16-17, and African-American voters have the opportunity to elect representatives of their choice in 29 percent (two of seven) of the districts. The non-Hispanic white VAP in the 7 districts is 39 percent, U.S. Ex. 20, pp. 16-17, and whites have a voting age majority in 29 percent (two of seven) of the districts.

48-53.[20] Consequently, the ability of Hispanic citizens to control 50 percent of the potential seats in Dade County alone and 43 percent in the seven Senate districts at issue indicates that they have substantially better than an equal opportunity to elect representatives of their choice than do white voters.[21] Section 2 of the Voting Rights Act requires no more.

3. The court below, in its July 17 opinion, completely ignored these dispositive considerations, never even mentioning the relevant numbers. Instead, the court read into Section 2 a principle of maximization, leading to the remarkable conclusion that the statute essentially required four Hispanic-controlled and two African-American-controlled districts in Dade County. *See* U.S. App. 40a-41a. Conversely, the 32 percent of white VAP in Dade County (and the approximately 40 percent white proportion of the citizen VAP) would, given the court's findings of racial cohesiveness

[20] While not available to the appellees at the time of trial, official United States Census Bureau data from 1990 indicate that, in Dade County — which, as indicated, contains a higher percentage of Hispanics than the seven districts as a whole — Hispanics make up 35.4 percent of the total voting age *citizen* population. Memorandum for the Record from Robert Kominski, Chief, Education & Social Stratification Branch, Bureau of the Census, United States Department of Commerce (June 8, 1992) and associated tabulations. Consequently, the numbers in text actually understate Hispanic overrepresentation. The Court can readily take judicial notice of this official census information because it is "not subject to reasonable dispute in that it is...capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201 F. R. Evid. *See Massachusetts v. Westcott,* 431 U.S. 323, 324 n.2. (1977); *Bowles v. United States,* 319 U.S. 33 (1943). Indeed, throughout these proceedings, all parties have consistently relied on census data.

[21] No one has challenged whether the three supermajority Hispanic VAP districts in the Senate Plan — all which have an Hispanic VAP of 64 percent or more — will enable Hispanics to "elect candidates of their choice." The districts in the Senate plan clearly comport with the district court's guidelines for an effective supermajority Hispanic VAP district, which include taking into account citizenship.

and bloc voting (*id.* at 44a-53a), have no opportunity to elect representatives of *their* choice. Nothing in the language of Section 2 or its legislative history supports that extreme conclusion. In *Turner* the district court noted, "the Supreme Court has rejected any claim to proportional representation or 'maximum feasible representation' throughout the history of the Voting Rights Act." *Turner,* 784 F. Supp. at 578.

The district court's reliance on *Gingles* to support its contrary result is mistaken. The decision and analysis in that case was expressly limited to "vote dilution through the use of *multimember* districts." 478 U.S. at 42 (emphasis added); *see also id.* at 46 n.12 (emphasizing limitation of the analysis and holding). In that specific context, the Court adopted the three so-called "Gingles preconditions": "First, the minority group must be able to show that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc...to defeat the minority's preferred candidate." *Id.* at 50-51. The district court in this case found that these three conditions had been established and, essentially on that basis, concluded that a violation as to both Hispanics and African-Americans had occurred, even though both groups are overrepresented in numerical terms.

This kind of reflexive, mechanical application of *Gingles* — in derogation of the statutory language — is nonsensical. It is one thing to conclude that the three *Gingles* factors make out a violation when they are shown to exist in a *multi*member district — where, by definition, a minority group consistently runs the risk that the majority can outvote it on all candidates. But it is an entirely different thing to hold that these factors govern in a case where *single*-member districts are at issue and the minority group is able to control more than its proportionate share of such districts. *Cf. Gingles,* 478 U.S. at 50 n.17 ("[t]he single-member district is generally

the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected").[22]

Not only did the district court fail to address the issue of proportionality, or even mention the relevant numbers, but the De Grandy appellants and the United States have now chosen to follow suit. Thus, both appellants assume a violation — even though the judgment says precisely the opposite — and then immediately turn to the issue of remedy. This is an especially telling evasion by the United States because, in *Gingles,* "the United States contend[ed] that if a racial minority gains proportional or *nearly proportional* representation in a *single* election, that fact alone precludes, as a matter of law, finding a § 2 violation." 478 U.S. at 75 (emphasis added). Here, more than proportional representation is assured for a decade.

In any event, we submit that neither the De Grandy appellants nor the United States can provide any principled defense for the liability ruling in the district court's July 17 opinion. The United States, in its response to the jurisdictional statement of the Florida House of Representatives (No. 92-519, *Wetherell v. De Grandy*), has argued that "when plaintiffs make a statewide claim of vote dilution involving a legislative body with statewide jurisdiction, the relevant area for determining a proportional representation defense must be the entire state as well." U.S. Motion to Affirm in Part and Vacate in Part at 13. In other words, even if a protected minority is proportionally represented in a single-district system in areas where it has a substantial, geographically compact presence, there can still be a Section 2 violation if the

---

[22] The court below also sought to buttress its ruling by finding, in addition to the three *Gingles* conditions, that Hispanics and African-Americans had also been discriminated against in areas other than voting. U.S. App. 53a-54a. This fact, however, similarly has no bearing on the overriding point that both groups had more than their proportionate share of representation in Florida's Senate districts.

statewide percentage of that minority is not proportionally represented in the statewide plan. For example, if Hispanics constitute half the voting population in Dade and they receive voting majorities in 3 of Dade's 6 seats, that would still amount to a violation if, based on Hispanics dispersed throughout the rest of Florida, the overall statewide percentage of Hispanics is 10 percent, in which case Hispanics must be given majorities in 4 districts out of the total of 40. This argument does not help the United States here, makes no sense, and was expressly disavowed in the court below.

First, under the Florida Senate Plan, Hispanics are proportionally represented even on a statewide basis. Thus, as the United States acknowledges, the official 1990 census data show that "Hispanics constitute 7.15% of the citizen voting age population of Florida." U.S. Motion to Affirm in Part and Vacate in Part at 14 n.5. Using that figure, Hispanics would be entitled to majority representation in 3 Senate districts (7.15% x 40). That is, of course, the number of districts in which Hispanics have an effective majority under the Senate Plan — *i.e.*, the three districts in Dade County.[23]

Second, under Section 2 of the Voting Rights Act, the statewide focus advanced by the United States here has no basis whatever. On the contrary, such an approach takes the notion of "maximization" to unprecedented heights, by artificially concentrating and thus inflating only minority presence within a single district of a multi-district plan. It is difficult to see, in a single member district plan, what relevance minority citizens in north Florida have to the *voting rights* of minority citizens several hundred miles

---

[23] The United States asserts that the "Census Bureau figures [concerning the percentage of Hispanic citizens in Florida] are not in the record in this case and therefore not properly before this Court." *Id.* at 14 n.5. This suggestion is nonsense. *See* p. 19, note 20, *supra*. The United States does not — nor could it — give a reason why a remand would be appropriate to consider undisputed census figures.

away in south Florida. In fact, aggregating these separate voters flies directly in the face of the first *Gingles* precondition of "geographic compactness." 478 U.S. at 50. Not surprisingly, the United States cites no authority to support its novel view. On the contrary, the only case to consider such a claim flatly rejected it. *See*, *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992).

Lastly, the United States's attempt to inject this new argument at this point in the litigation is patently unfair. The United States (and the De Grandy appellants) charged not that there was "statewide" vote dilution but only that the Florida Plan "dilute[s] the voting strength of Hispanic citizens in several *areas* of the state." U. S. Complaint ¶ 8 (reprinted in U.S. Motion to Affirm in Part and Vacate in Part at 3a). At trial, moreover, the court ruled — and the parties agreed — that "we're going to only consider evidence as to three counties: *as to the Senate Plan, Dade County;* as to the House Plan, Dade County, Escambia County, and Alachua or the Alachua area. We're not interested in hearing other matters." Tr. I, 101 (emphasis added). The court also emphasized the importance of this limitation, admonishing the plaintiffs that "you must tell these defendants now the exact counties that you're talking about." *Id.* at 103. The United States's desperate attempt to change the contours of this litigation now that its position below turns out to be indefensible in this Court should be rejected.

In sum, there is simply no way to view the hard numerical facts about Dade County — or the State of Florida — and conclude that the Florida Senate Plan affords Hispanics "less opportunity than other members of the electorate...to elect representatives of their own choice." The district court's judgment finding no liability, therefore, should be summarily affirmed.

III. THE DISTRICT COURT'S FACTUAL FINDING THAT THE FLORIDA SENATE PLAN MOST FAIRLY BALANCES THE COMPETING INTERESTS OF AFRICAN-AMERICAN AND HISPANIC VOTERS ALSO DEMONSTRATES THAT THE PLAN DOES NOT VIOLATE THE VOTING RIGHTS ACT.

The district court's judgment that the Florida Senate Plan does not violate Section 2 should be affirmed for a second, reinforcing reason. The court found that, of "all the plans presented to the court, the *Florida Senate Reapportionment plan is the fairest to all the ethnic communities* in Dade County and the surrounding areas." U.S. App. 66a (emphasis added). In particular, the court elaborated, "[t]he state of Florida, faced with the competing interests of Hispanics and African-Americans in Dade County, sought to strike the fairest balance in its Senate reapportionment plan." *Id.* at 63a-64a.

The district court's factual finding that the Florida Senate Plan most fairly balances the competing interests of both affected minority groups is fully supported by the evidence. That finding, in turn, compels the conclusion that there was no Section 2 violation here: if a state plan, viewed through the prism of *maximizing minority interests,* can violate Section 2 even though it is found to be "fairest" in balancing such interests when they are "at odds" with one another (U.S. App. 44a), it is impossible to imagine a plan that would not be in violation.

1. The district court's dispositive conclusion that the Florida Senate Plan most fairly balances the "competing interests of Hispanics and African-Americans" is indisputably a factual finding and thus cannot be disturbed unless "clearly erroneous." Rule 52(a), Fed. R. Civ. P. Indeed, this Court has already held that "the ultimate finding of vote dilution [is] a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Gingles,* 478 U.S. at 78. The district court's

"fairness" finding here is precisely such a finding. *See* U.S. App. 63a (creation of an additional Hispanic district, as sought by appellants, would "dilute the African-American vote").

This factual finding is certainly not clearly erroneous. It rests on an analysis of "all of the evidence" (*id.* at 63a), beginning with the evidence showing that, under the Florida Senate Plan, Hispanics and African-Americans are each effectively able to control three districts in south Florida, including one district where African-Americans have less than a majority of potential voters but can still "elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a. (Notably in this regard, when the Florida Senate elections were subsequently held under the State's Plan on November 3, 1992, three Hispanics and three African-Americans were elected in south Florida, just as the court had anticipated.)

The court's finding is also fully supported by the evidence regarding the effect of moving district lines in an attempt to create a fourth Hispanic district. Reviewing two separate plans that had sought to do so, the court found that the first (submitted by the De Grandy appellants) was not a "viable option": *i.e.*, it would not, in fact, create a fourth Hispanic district because the numerical strength of Hispanics in that district would be too low. U.S. App. 58a n.46. And, as for the other plan, which did create four Hispanic districts, the court found that it "is retrogressive to African-Americans in Dade County and the surrounding areas" because it imperiled their ability to elect a third representative. *Id.* at 63a.

In sum, the court's ultimate finding that the Florida Senate Plan was fairest in accommodating the competing interests of two *minority* groups is solidly grounded in the record. This finding leads directly to the legal conclusion that the Plan does not violate Section 2: Nowhere in the text or legislative history of the Voting Rights Act is there the slightest hint that a good faith effort to accommodate such competing

interests could possibly give rise to a violation. *A fortiori,* a plan that is actually found to be the "fairest" in balancing those interests does not violate the statute.

The court below nevertheless reached a contrary conclusion in its opinion, holding that the Florida Senate Plan violated the rights of both Hispanics and African-Americans, but that since it was still the fairest plan available, it would be adopted as a remedy. That holding rests on a fundamentally flawed legal conclusion — that a plan which most fairly balances the competing interests of minority groups is unlawful under Section 2. But this obvious legal error does not infect the court's underlying factual finding. And that finding provides a compelling ground for summarily affirming the district court's judgment, which correctly held that the Senate Plan does "not violate Section 2 of the Voting Rights Act." U.S. App. 5a.

2. The United States and the De Grandy appellants never come to grips with the district court's dispositive fairness finding or its inescapable implication that no violation occurred here. Instead, they devote their efforts to arguing that they must be given yet an additional opportunity to redraw Florida's Senate districts in an attempt to show that they can create four Hispanic and three African-American districts in the Dade area. The United States also suggests that this case should be held for *Voinovich v. Quilter,* No. 91-1618 (pending). These arguments are meritless.

a. Appellants' request for further remedial hearings is an unwarranted diversion. The United States and the De Grandy plaintiffs were fully on notice that the district court would be considering alternative plans. In fact, as just noted, the De Grandy plaintiffs submitted a plan with a proposed fourth Hispanic seat prior to trial, so that it could be so considered, as did a group of plaintiff-intervenors (referred to as the "Reaves plan" in the opinion below). The NAACP also submitted a plan. And while the United States did not file a separate plan, it supported the De Grandy and the Reaves alternatives. Tr. I, 58. The district court then evaluated each of these plans and found that none could create a fourth Hispanic seat without simultaneously impairing the interests of African-American voters. *See* U.S. App. 64a.

Appellants nevertheless argue that still more plans must be considered at a further hearing because not until after trial were the parties "informed for the first time that a 4-3 plan was necessary to remedy the Section 2 violations." U.S.J.S. at 14. But this claim is totally without merit because, as the United States concedes, the district court made clear throughout the proceedings that it was concerned about and would hear evidence on "whether establishment of a fourth Hispanic district would have a regressive effect on African-American voters." *Id.* at 4-5 (citations omitted). In response, such evidence was submitted both by the NAACP and by appellees. *See* p. 7, *supra*. There is thus no basis on which appellants can claim that they were taken by surprise and inadvertently submitted or supported a plan with four Hispanic seats, without regard to its potentially regressive effect on African-American voters.

The simple fact is that an electoral map with four Hispanic districts cannot reasonably be drawn in the Dade County area without simultaneously disadvantaging African-Americans. Both proposals that attempted to do otherwise already went far beyond the compact seven district area covered by the Florida Senate Plan — involving in one instance 8 new counties (outside Dade, Monroe and Broward) and an area up to 110 miles wide extending 125 miles north of Dade County, and in the other instance 7 new counties and an area up to 55 miles wide extending 145 miles north of Dade County. *See* Senate Def. Ex. 3 and 4. If, within that incredibly wide swath, two separate plans, while obviously trying to do so, could not create a fourth Hispanic seat without having a negative impact on African-American voters, it is time to end the inquiry. Indeed, appellants have already gone far beyond the point where even the first *Gingles* precondition — "geographic compactness" — can be said to apply.

b. The United States also argues that this case should be held pending this Court's decision in *Voinovich v. Quilter*, No. 91-1618. Even as articulated by the United States, the argument has no force: it rests on vague speculations about potential legal issues that suggest only the most attenuated link between the two cases. Upon scrutiny, moreover, the United States's argument is even weaker than it appears.

Voinovich involved a claim that an Ohio reapportionment plan "unnecessarily packed black voters into electoral districts and fragmented other concentrations of black voters in violation of Section 2." Br. for the U.S. as *Amicus Curiae* in *Voinovich* at 4. The three-judge district court rejected the Ohio plan, concluding that the "wholesale creation of majority-minority districts" violated Section 2 unless the State could first demonstrate that a Section 2 violation already existed. *Quilter v. Voinovich* 794 F. Supp. 695, 701 (N. D. Ohio 1992). The court then found that Ohio had not made the requisite showing in that case. *Id.* The issues on appeal, as the briefs (including that of the United States) demonstrate, concern "whether the district court erred in holding that the State of Ohio violated Section 2 of the Voting Rights Act, by adopting a legislative redistricting plan that created majority-minority electoral districts despite the absence of proof that creation of such districts was required in order to remedy a violation of the Voting Rights Act." U.S. Br. at 6.

Neither that issue — nor anything remotely like it — is presented in this case, which involves not alleged "packing" of minorities but alleged "dilution" of minorities. Nor is there any reason to expect that the resolution of the very different question in *Voinovich* will have any bearing on this case. To begin with, of course, the grounds that we raise as a basis for dismissing or affirming appellants' jurisdictional statements have nothing to do with *Voinovich*. There was no issue in that case concerning a contradictory judgment and opinion (*see* pp. 12-14, *supra*); no issue concerning whether a minority group can successfully invoke Section 2 in circumstances

where the numbers indisputably show that they have at least proportional representation in the single-member districts they challenge (*see* pp. 15-23, *supra*); and no issue based on an express factual finding that the State's Plan most fairly balances the competing claims of *two* minority groups (*see* pp. 24-26, *supra;* U.S. App. 66a).

This last point also demonstrates how unrelated *Voinovich* is even to the remedial issue that the United States and the De Grandy appellants have raised. As an initial matter, the question whether it was reversible error for the district court to have failed to hold an evidentiary hearing is clearly not presented in *Voinovich*. Moreover, that case raises no question regarding the effect on one minority group's rights if efforts are made to remedy a violation of another such group's rights. The United States nevertheless attempts to link the two cases by noting that its *Voinovich* amicus brief — and apparently only its brief — discusses "whether the failure to draw an influence district can violate Section 2." U.S. Br. at 18. The United States then argues that, if this Court answers that question in the negative, "it would follow that the district court in this case erred to the extent that it denied relief to Hispanic voters because it might result in the loss of an African-American influence district." *Id.* This logic is both puzzling and inapt.

It is puzzling because even if there is no statutory right to a so-called "influence district" (*i.e.*, a substantial, but less than majority, minority district), it hardly follows that a court can properly remedy a violation against one minority by impairing the interests of another minority, which, according to the United States and the opinion below, has also had its Section 2 rights violated. In any event, labels aside, the fact is that, in this "influence district," African-American voters "*can* elect a candidate of their choice because of strong minority coalitions between African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a (emphasis added). The United States thus cannot finesse the "robbing-Peter-to-pay-Paul" problem here by

intimating that "influence districts" are somehow less valuable or less worthy of protection in Section 2 cases than are majority-minority districts.

In summary, there is no reason for the Court to delay resolution of this case pending the outcome of *Voinovich*. Appellants' appeals should be dismissed or the district court's no-violation judgment should be affirmed on the basis of the merits arguments pressed above. If not, this case should be set for plenary review.[24]

CONCLUSION

The jurisdictional statements of the United States and the De Grandy appellants should be dismissed or, in the alternative, the District Court judgment of no liability should be affirmed.

Respectfully submitted,

JOEL I. KLEIN
PAUL M. SMITH
Klein, Farr, Smith & Taranto
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

STEPHEN N. ZACK
(Counsel of Record)
NORMAN C. POWELL
Zack, Hanzman, Ponce & & Tucker, P.A.
3300 International Place
100 S.E. Second Street
Miami, Florida 33131
(305) 539-8400

---

[24] In an appeal filed on behalf of the Florida House of Representatives in No. 92-519, *Wetherell v. De Grandy*, the House appellants have presented a question (number 4 in their jurisdictional statement), concerning whether "principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding." Although we do not think that this issue presents a ground for summary disposition of the De Grandy and United States appeals, we do wish to preserve the claim if the Court decides to grant plenary review of this case.